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IN THE

Supreme Court of The United States

OCTOBER TERM, 1969

No. 1533

JULIUS EPSTEIN,
Petitioner,

v.

STANLEY RESOR, Secretary of the Army; DEPARTMENT OF THE ARMY; DEPARTMENT OF DEFENSE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 4, 1970

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The petitioner Julius Epstein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 6, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Northern District of California, appears in 296 F. Supp. 214 (N.D. Cal. 1969), and also in Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 6, 1970. No petition for rehearing was filed. This Petition for Certiorari was filed within 90 days of the date the judgment of the Court of Appeals was entered. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. What is the scope of judicial review of the Army's claim to exemption from disclosure requirements of the Freedom of Information Act where exemption is allegedly premised on interests of national defense or foreign policy?

2. Has the Army satisfied its statutory burden respecting permissible withholding of records where it establishes only its own good faith belief in the propriety of its claim to exemption?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 5:

Sec. 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

. . . .

(3) Except with respect to the records made available

under paragraphs (1) and (2) of this subsection, each agency on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to the causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

. . . .

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

. . . .

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90-23, § 1, June 5, 1967, 81 Stat. 54.

STATEMENT OF THE CASE

Petitioner, an historian who is currently serving as a research associate at Stanford University's Hoover Institution on War, Revolution and Peace, has filed suit pursuant to Section 3 of the Freedom of Information Act, 5 U.S.C.A. Section 552(a)(3), seeking to enjoin the continued withholding of documents contained in Army file #383.7-14.1 entitled "Forcible Repatriation of Displaced Soviet Citizens —Operation Keelhaul."

Since 1954, petitioner has continually requested permission from the Department of the Army to review the contents of the Operation Keelhaul file in connection with a book he is preparing on the subject of forced repatriation of anti-Communist Russians after World War II. Petitioner's primary area of interest as an historian has concerned war refugees. In 1959, he was appointed by the Eisenhower administration as a member of the White House Conference on Refugees. He has drafted a bill for the creation of a select House Committee to investigate past and present forcible repatriation, and has testified before Congressional Committees on immigration and refugee problems. (Record, pp. 183, 194, 196). Petitioner believes that the file which remains prohibited to him will provide information, not otherwise available, as to approximately 900,000 anti-Communist Russians who were allegedly forcibly repatriated from Germany to the Soviet Union at the end of the World War II, and who are believed to have either died or been executed in slave camps after such repatriation. (Record, p. 183).[1]

The file in question was generated over 20 years ago by Allied Force Headquarters of World War II. On discon-

[1]Reference is to the certified transcript of record in this case, previously transmitted to the Court.

tinuation of that body at the end of the War, a microfilm copy of its records was made for the use of the United States, and the records were then transferred to the Historical Section of the British Cabinet Office in London.[2] The file, originally stored as an historical record with the Army, was finally transferred to the National Archives and Records Service, General Services Administration, "in accordance with normal Department of the Army disposition and retirement procedures." (Record, pp. 186, 188, 23). The Army takes the position, as it has since 1954, that it has the right to prohibit release of this twenty year old file to an American historian who is badly in need of it for the completion of his work on forcible repatriation.

Petitioner's efforts to secure release of the file in question are well documented (Record, pp. 185 through 199), and bear almost audible testimony to the earnestness of petitioner's efforts to secure this information through available channels. The Army's initial refusal, by letter of August 5, 1955, stated that the current high security classification of the documents was required to be maintained indefinitely. (Record, p. 186). After a series of further requests (Record, pp. 187, 190, 192) and a series of vacillating replies (Record, pp. 189, 191, 193) extending over the period from 1955 to 1966, petitioner again requested the Operation Keelhaul file from the Army on July 22, August 14, and September 27, 1967. (Record, p. 194, 196, 198). He was first told that the information was Security Classified and could not be made available for "unofficial research purposes" at the present time. (Record, p. 195). He was subsequently told that the file would be reviewed again "in consultation with the departments and agencies concerned.

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[2]NATIONAL ARCHIVES AND RECORDS SERVICE, GENERAL SERVICES ADMINISTRATION, VOL. II FEDERAL RECORDS OF WORLD WAR II, MILITARY AGENCIES 769 (National Archives Pub. No. 51-8, 1951).

This may take some time." (Record, p. 197). Finally he was informed by Major General Wickham that re-examination of the file had been completed and "the factors that dictated the retention of the Security Classification in 1954 have not changed." Thus, the file could not be reclassified. (Record, p. 199).

On Independence Day, Fourth of July, 1967, the Freedom of Information Act, codified in 5 U.S.C. § 552, became effective.[3] "In February, 1968 [petitioner] again requested release of the file. In response he was advised by the Adjutant-General of the Army that a complete re-examination of the file had been directed; that the 1967 action had been based on the contents of the file in its entirety; that the current review of the file was proceeding on a paper-by-paper basis." (Ninth Circuit's findings of fact. Appendix p. 21).

On March 26, 1968, petitioner filed his complaint (Record, p. 1) seeking an order enjoining the Army from continuing to withhold the file. The Army moved for summary judgment, and Major General Wickham filed an affidavit (Record, pp. 23-27) stating, in essence, that the over-all classification of "top secret" "was required because the file [as originally received] contained many individual TOP SECRET documents of combined or British origin." The affidavit continues that the combined or foreign origin of some of the documents contained in the file necessitates retention of its over-all "top secret" classification. Because the file contains some individual "top secret" documents of British or combined U.S.-British origin, the affidavit asserts that, under Army regulations (Army Reg. 380-6, Record pp. 159-170) this Government cannot declassify or release the file to an American citizen without the permission of the

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[3]The relevant provisions of the Information Act are set out above under the heading "STATUTORY PROVISIONS INVOLVED."

British Government. Major General Wickham's affidavit continues:

> "A current review of the file requested by plaintiff is now in progress on a paper-by-paper basis. This review of individual papers has been completed within the Department of the Army and coordination is now in progress with the Joint Chiefs of Staff and the Department of State to verify the position of the United States Government with respect to each paper. The outcome of this effort will determine the possibility of requesting a review and redetermination of the classification of some or all of the documents by the British government. This Department will continue on its present course of coordinating the declassification of the file with the concerned agencies. The complexity of interests in these files indicates considerable time will pass before a final determination is made." (Record, p. 26.)

The District Court for the Northern District of California granted a summary judgment in favor of the Army. 296 F. Supp. 214 (N.D. Cal. 1969). Although Section 552(a)(3) of the Freedom of Information Act directs that "the court shall determine the matter *de novo* and the burden is on the agency to sustain its action," the District Court held that "this jurisdiction does not apply to information that falls within the exemptions" specified by the statute. (Appendix, p. 28). The Court also held that its jurisdiction was limited to determining whether the Army acted capriciously in asserting its claim for exemption. Referring to General Wickham's affidavit, the nature of the general subject matter of the file, and certain remarks prepared by petitioner in support of a House Resolution quoting the preamble thereof, the District Court concluded that the nature of the information alone renders the circumstances appropriate for the Army's claim of exemption in the interests of national defense and foreign policy. See Appendix hereto at page 34.

On April 17, 1969, petitioner noticed his appeal from the District Court decision. On November 19, 1969, proceedings were had before the United States Court of Appeals for the Ninth Circuit, and on February 6, 1970, the Ninth Circuit entered its judgment affirming the holding of the District Court. The American Civil Liberties Union of Northern California appeared in support of petitioner in the Ninth Circuit as *amicus curiae*.

The Ninth Circuit opinion upholds, in theory only, the statutory provisions for *de novo* review of the conditions of exemption. The court proceeds to distinguish the exemption based on national defense or foreign policy in such a way as to emasculate the Freedom of Information Act. The Ninth Circuit, in essence, holds that the only prerequisite to a claim for such exemption is the Army's own good faith belief that it is entitled to it. The opinion narrows the permissible scope of the court's inquiry, in express contradiction to the language of the Act, to the question of whether the Army's claim for exemption is "arbitrary or capricious". In sum, the Court abdicates its responsibility, under Section 552(a)(3) to determine whether records have been "improperly withheld."

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DIVERGES SHARPLY FROM CONSTITUTIONAL PRINCIPLES OF JUDICIAL REVIEW REGARDING THE EXTENT OF EXECUTIVE AUTONOMY IN MATTERS OF FOREIGN POLICY.

The Army claims exemption from the statutory disclosure requirements of the Freedom of Information Act on the basis of Section 552(b)(1), which exempts from disclosure matters that are "specifically required by Executive Order

to be kept secret in the interest of the national defense or foreign policy."

The issue in this case is the scope of judicial review of the Army's determination that it is entitled to claim such exemption.

The Ninth Circuit gives lip service to the statutory requirement of *de novo* judicial review by holding in principle that "judicial review *de novo* with the burden of proof on the agency should be had as to whether the conditions of exemption in truth exist." See p. 23 of Appendix hereto. The court's subsequent discussion and holding, however, confines the scope of judicial review to the narrow question of whether a claimed exemption is "arbitrary or capricious."[4] See p. 25 of Appendix hereto. The court purports to create its own exemption to the explicit statutory standard of "*de novo*" review by distinguishing the exception provided in the interest of national defense or foreign policy from the other exceptions provided in § 552(b).[5]

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[4]A review standard based on the criteria "arbitrary and capricious" is severely restrictive in scope in comparison with the standard of "*de novo*" determination provided by the Freedom of Information Act. "*De novo*" signifies "anew, afresh; a second time." BLACK'S LAW DICTIONARY 483 (4th ed. 1951). The Supreme Court, in *Fed. Radio Comm'n v. Nelson Bros. B. & M. Co.*, 289 U.S. 266, 276 (1932), found the "capricious and arbitrary" standard to be a "limitation . . . in sharp contrast" with a previous grant of authority which authorized the District Court to receive additional evidence and enter a new judgment based on what it considered just.

[5]The other exemptions are contained in § 522(b)(2)-(9) as follows:

"(b) This section does not apply to matters that are—

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure

(Continued on following page)

It makes this distinction on the ground that "[u]nder the others (with the exception of the third) the very basis for the agency determination—the underlying factual contention—is open to judicial review (Citations). Under (b)(1) [the exemption in question] this is not so." Appendix p. 24. The rationale of the court's distinction—that the factual basis underlying executive determinations in the international realm is foreclosed to judicial scrutiny—conflicts with constitutional principles of judicial review.[6]

The Ninth Circuit opinion proceeds to analyze the Army's claimed exemption according to whether it is "arbitrary or capricious." In so doing it unilaterally formulates a special and restrictive standard of review not contemplated and, in fact, expressly excluded by the applicable statutory language. However, even in applying such special standard the Ninth Circuit's opinion conflicts with accepted constitutional principles respecting the judicial duty and obligation to ascertain whether the executive has exercised its decision-making prerogative in a reasonable manner.[7]

(Note 5 Continued),

of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells."

[6]This Court has established that, although the President's power in the field of international relations is "delicate, plenary and exclusive," it is one "which, of course, *like every other governmental power*, must be exercised in subordination to the applicable provisions of the Constitution." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (Emphasis added).

[7]Because executive action is subject to the constitution, *id.*, the court must determine the reasonableness of such action in order to find that the requirements of due process are satisfied.

In this case the Ninth Circuit appears to have charted a different course for the court because of the Army's claim that considerations of national defense and foreign policy apply. The Ninth Circuit agreed with the District Court that the Army's claim to exemption was neither arbitrary nor capricious, based upon the Army's showing. In so holding it was satisfied "that judicial inquiry into this narrow area does not, at least in this case, warrant *in camera* examination of the file." Appendix p. 25. Thus the Ninth Circuit relied, as did the District Court in reaching its decision, on the Army's own conclusion that it is entitled to the exemption for secrecy in the interest of national defense or foreign policy.

The circumstances of the instant case are not comparable to those existing in other cases in which courts have shielded the executive from disclosure without requiring substantiation of the privilege. Where courts have not seen fit to examine the factual basis asserted for an executive exemption, the urgency of surrounding circumstances has obviated the need for such an inquiry by disclosing the existence of some reasonable basis for the executive claim.[8] The Supreme Court, in *United States v. Reynolds,* 345 U.S. 1 (1953) affirmed its obligation to

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[8]*See United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936) (involving a charge of conspiracy to sell arms of war to a belligerent in violation of a Joint Resolution of Congress and a presidential proclamation); *Chicago & S. Air Lines v. Waterman S.S. Corp.* 333 U.S. 103 (1948) (involving the operation of air routes in overseas and foreign transportation) in which the Court stated:

> "That aerial navigation routes and bases should be prudently correlated with facilities and plans for our own national defenses and raise new problems in conduct of foreign relations, is a fact of common knowledge" (at p. 108);

and *United States v. Reynolds,* 345 U.S. 1 (1953) (involving newly developed secret Air Force electronic devices and a "time of vigorous preparation for national defense").

determine the reasonableness of a claim of privilege,[9] and was able to fulfill that obligation without examining the document in question because of the overly sensitive and threatening nature of the surrounding circumstances.[10] In the instant case, however, there are no such apparent or demonstrated circumstances on which the Ninth Circuit could premise its finding of reasonableness.[11] Moreover, that court actually recognized that existing circumstances suggest a contrary finding in conceding that "the passage of time may cast doubt on the continuing need for secrecy. . . ." (Appendix p. 25). Notwithstanding such doubts and the absence of any evidence or affirmative showing of jeopardy, or even consequence to the national defense or foreign policy, the court found that the Army, by its claim

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[9]Mr. Chief Justice Vinson emphasized:

"Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. . . . It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate. . . ." (at pp. 9-10).

[10]The Court noted "In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense." 345 U.S. at 10.

[11]It is now fifteen years after release of the papers concerning the Yalta Conference, treating among other sensitive subjects, the repatriation of Soviet nationals. See Dept. of State Public. 6199, FOREIGN RELATIONS OF THE UNITED STATES, THE CONFERENCES AT MALTA AND YALTA *1945* (1955). In addition, the four documents that were declassified after twenty years of secrecy reveal no basis for the Army's continued withholding of others. Their nature, in fact, provides strong basis for questioning the Army's reasonableness in withholding them so long. These documents consist of (1) a request for interpreters, (2) a request for authorization concerning immigration of Soviet citizens not encompassed by the forcible repatriation provisions of the Yalta Agreement, (3) a message confirming the defeat of proposals to submit names of prospective immigrants to countries of origin, and (4) a letter describing the form of certificate to be issued to individuals found to be non-Soviets. (Items number (2) and (3) were originally classified only as secret.)

to exemption alone had made "more than a sufficient showing." (Appendix p. 25).

The question is whether a reviewing court can properly discharge its responsibility under the Information Act to determine whether material has been "improperly withheld" by relying solely on the unsupported claims of the agency which seeks to avoid disclosure. Even in terms of its own specially-invoked standard of "arbitrary or capricious," the Ninth Circuit's holding conflicts with the constitutional standard of judicial review; the holding represents a rejection of the court's responsibility to require a reasonable basis for executive action. "A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law." *Federal Radio Comm'n. v. Nelson Bros., B. & M. Co.*, 289 U.S. 266, 277 (1932). The unique standard of judicial deference thus fabricated threatens the careful delineation on which the doctrine of separation of powers is premised and subverts the clear intent of a statute which expressly provides for *de novo* judicial review in cases where information is withheld. For these reasons petitioner requests that certiorari be granted to review the judgment below.

2. THE DECISION BELOW PRESENTS AN IMPORTANT FIRST IMPRESSION ISSUE OF STATUTORY CONSTRUCTION BY SEVERELY CONSTRICTING THE PUBLIC'S RIGHT TO OBTAIN INFORMATION UNDER THE FREEDOM OF INFORMATION ACT.

"In exercising the equity jurisdiction conferred by the Freedom of Information Act, the court must weigh the effects of disclosure and nondisclosure according to traditional equity principles and determine the best

course to follow in the given circumstances. The effect on the public is the primary consideration. *Gen. Servs. Administration v. Benson,* 415 F.2d 878, 880 (9th Cir. 1969).

Supreme Court review of the Ninth Circuit's opinion is necessary to enable the public to utilize the Information Act in accordance with legislative intent.[12] Since the effect on the public is the primary concern, courts abdicate their responsibility to the public interest by deferring to an agency, which by refusing to disclose, has already subordinated the public's interest.

The court below deferred entirely to the Army's judgment in this case, without even addressing the following questions as to the Army's authority, under applicable rules, to withhold information.

(1) Does the Act require a specific Presidential determination that requested information be kept secret?

No Executive Order specifically decrees that the Operation Keelhaul file or the contents thereof be kept secret in the interests of national defense or foreign policy. The Army, rather, premises its claim to exemption on the asserted authority of an Army official to conclude that secrecy in a particular instance is required under the terms of an Executive Order which generally provides for classi-

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[12]"It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure. . . ." S. REP. NO. 813, 89th Cong., 1st Sess. (1965). Professor Davis, referring to the differences between the Senate and House committee reports (H.R. REP. NO. 1497, 89th Cong., 2d Sess.) states:

"In general, the Senate committee is relatively faithful to the words of the Act, and the House committee ambitiously undertakes to change the meaning that appears in the Act's words. The main thrust of the House committee remarks that seem to pull away from the literal statutory words is almost always in the direction of nondisclosure. The *Attorney General's Memorandum* consistently relies on such remarks by the House committee." Davis, *The Information Act: A Preliminary Analysis,* 34 U. CHI. L. REV. 761, 763 (1967).

fication of certain documents.[13] Thus the instant case raises the question of the extent of agency prerogatives in classifying materials when direct Presidential sanction is wholly lacking.[14]

Major General Wickham, who signed the affidavit asserting exemption from disclosure is neither the head of the Department of the Army nor of the Department of Defense. Thus, the case also raises the issue of whether the official claiming the exemption may be someone other than the political head of the department having control over the matter, as required by *United States v. Reynolds*, 345 U.S.1, 7-8 (1953) and the case cited therein.

These companion questions relating to the degree of deference which a court should properly accord a claim of exemption will remain unanswered and troublesome in future cases unless this Court undertakes to resolve them.

(2) Does information generated by Allied Force Headquarters derive from an "international organization"?

The Army asserts that Allied Force Headquarters is an "international organization" within the meaning of Execu-

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[13]Exec. Order No. 10,501 as amended, 3 C.F.R. 979, 50 U.S.C.A. § 401 (1970 Supp.) (1953), Record, pp. 67-85.

[14]The statutory burden of showing the necessity of a secrecy classification is more easily discharged where Presidential expertize is invoked as supportive of such classifications, even indirectly. The degree of Presidential involvement in decision-making is directly related to the court's willingness to defer. *(See, e.g., Chicago & S. Air Lines v. Watermann S.S. Corp.*, 333 U.S. 103, 109 (1948) in which the Court refused to overturn a Civil Aeronautics Board order denying the right to one applicant to operate foreign overseas air routes, emphasizing that, with respect to such applications, "Presidential control is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies".

tive Order 10501.[15] With respect to information originated by "international organizations," sections 3(e) and 4(a) of such order provide a means of circumventing the stringent standards governing top secret classifications[16] by requiring, respectively, as protective a classification by the United States as that required by the originating entity, and excluding such material from automatic downgrading or declassification. The Ninth Circuit accepted the Army's assertion on this point without discussion, and this significant question of statutory construction deserves this Court's attention.

(3) The most far-reaching and crucial question in terms of the efficacy of the Freedom of Information Act in accomplishing its avowed purpose[17] is whether a United States

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[15]22 U.S.C.A. § 288 provides a definition of "international organization" as "a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress . . . and which shall have been designated by the President by appropriate Executive order. . . ." Allied Forces Headquarters does not fall within this definition of "international organization," and there has been no Presidential designation.

[16]*See*, Exec. Order No. 10,501 §§ 3(e), 4(a) as amended, Record, pp. 69, 82. Section 1(a) of such order otherwise provides:

"Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense."

[17]"An exploration of the legislative history behind this enactment reveals that the premier purpose of the Act was to elucidate the availability of Government records and actions to the American citizen. In addition, Congress sought to eliminate much of the vagueness of the old law (citation)." *American Mail Line, Ltd. v. Gulick*, 411 F2d 696, 699 (D.C.Cir. 1969).

agency can deny access to information by asserting a foreign privilege. The Army maintains that British permission is a necessary precondition to divulgence of the requested file.[18] The basis of the Army's assertion is Army Regulation 380-6, paragraph 4(b), providing that records of combined or foreign origin "are not subject to unilateral regrading action by the United States." (Major General Wickham's Affidavit, Record p. 74). Under the Army's construction of its regulations, disclosure requirements can be effectively thwarted by merely "attributing" information to any one of a wide variety of foreign governments or entities.[19]

The Ninth Circuit assumed, without discussing, the validity of requiring a foreign government's approval of disclosure, a requirement which would quickly destroy the force of the Information Act since the Army would hold that such approval must be obtained before the Information Act applies.[20] In effect, such a requirement would subject an American citizen's rights under a U.S. statute to the

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[18]The Army makes this argument with respect to the entire file, notwithstanding the fact that Major General Wickham's affidavit states only that the file contained "many"—not all—individual top secret documents. In addition, it is possible that some of the file's contents are entirely American-originated, since records of "unintegrated United States Staff sections" were transferred to the U.S. FEDERAL RECORDS OF WORLD WAR II, *supra* note 2.

[19]Under Army Regulation 380-6 material

> "Originated by or containing classified information *clearly* attributed to foreign governments or their agencies, or to international organizations and groups, including the Combined Chiefs of Staff"

may be declassified only by the originating entity. Record, p. 147.

[20]Such a construction would clearly conflict with the legislative purpose of "eliminating vagueness", *American Mail Line, Ltd. v. Gulick*, 411 F2d 696, 699 (D.C.Cir. 1969) in that the American citizen can hardly be expected to have a very clear understanding of foreign laws relating to information disclosure.

sovereignty of a foreign power, regardless of the reasonableness of requiring a foreign government's approval under the circumstances of each individual case. Thus an American citizen's rights may be effectively defeated by a requirement that, in any given case, lacks a reasonable basis for its imposition. There may be no rational ground for requiring another government's approval, as in this case where no showing has been made of any British restrictions currently in force, on any basis for British objection to disclosure.[21]

The Ninth Circuit's approach, if followed, would unreasonably render rights conferred by the Information Act subject to recognition by a foreign government which has no rational interest in preventing disclosure. The resulting anomaly between the Act's legislative purpose and such restrictive implementation is apparent. Because the Information Act was designed to apply the democratic conviction in the free market place of ideas and an open society to the individual citizen, its application is of immediate significance to the nation as a whole. It is imperative that this Court examine and resolve the varying statutory interpretations in order that the purpose which the Act was intended to achieve may be ascertained and realized.

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[21]Even at the end of the war the British apparently considered the file to be of only historical significance since, when transferred to Britain, it was relegated to the Historical Section of the British Cabinet Office, FEDERAL RECORDS OF WORLD WAR II, *supra* note 2. The Army's claim of British privilege is especially incongruous in view of the fact that it transferred the file to the National Archives, reserving only the right to rule on requests for disclosure. Major General Wickham's Affidavit, Record, pp. 73, 74.

Conclusion

For these reasons, Petitioner requests that certiorari be granted to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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May 4, 1970

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JULIUS EPSTEIN, *Plaintiff-Appellant,* v. STANLEY RESOR, Secretary of the Army, DEPARTMENT OF THE ARMY; DEPARTMENT OF DEFENSE, *Defendants-Appellees.*	No. 24,275

[February 6, 1970]

On Appeal from the United States District Court for the Northern District of California

Before: MERRILL, KOELSCH and HUFSTEDLER, Circuit Judges

MERRILL, Circuit Judge:

This suit was brought pursuant to the Freedom of Information Act, 5 U.S.C. §552(a)(3)[1] to enjoin appellee, as Secretary of the Army, from continuing to withhold from appellant documents contained in an Army file.

[1] "* * * [E]ach agency, on request for identifiable records made in accordance with published rules * * * shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action." For a discussion of the Act, *see* Davis, *The Information Act: A Preliminary Analysis*, 34 U.Chi.L.Rev. 761 (1967).

Appellant, a historian, is research associate at Stanford University's Hoover Institution on War, Revolution and Peace. His special interest concerns war refugees. He is preparing a book on the forced repatriation of anti-Communist Russians following World War II, and for this purpose desires to examine the Army file designated "Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul."

This file was generated over twenty years ago by the Allied Force Headquarters of World War II. That agency had classified the entire file as top secret. At the close of the war, the British Government received the original and the United States Department of the Army received a photoprint copy. The file contains a number of individual documents, some of which are of British or combined United States-British origin. Upon its receipt the Army maintained the top secret classification under Executive Order 10501 and it has not yet been declassified.

After storage as a historical record with the Army the file was finally stored with the National Archives and Records Service, General Services Administration. The classification of the file was reviewed by the Army in 1954 and the classification was retained. In 1967 appellant sought declassification. The file again was reviewed and again the classification was retained.

In February, 1968, appellant again requested release of the file. In response he was advised by the Adjutant-General of the Army that a complete re-examination of the file had been directed; that the 1967 action had been based on the contents of the file in its entirety; that the current review of the file was proceeding on a paper-by-paper basis. In March, 1968, this action was brought.

Appellees sought summary judgment. In support of their motion they filed an affidavit of the Adjutant General. That

affidavit, under date of May 29, 1968, stated that the paper-by-paper review of the file was still in progress. It went on:

> "This review of individual papers has been completed with the Department of the Army and coordination is now in progress with the Joint Chiefs of Staff and the Department of State to verify the position of the United States Government with respect to each paper. The outcome of this effort will determine the possibility of requesting a review and redetermination of the classification of some or all of the documents by the British Government. This Department will continue on its present course of coordinating the declassification of the files with the concerned agencies. The complexity of interests in these files indicates considerable time will pass before a final determination is made. In the meantime, the documents remain classified TOP SECRET • • •."

The District Court granted summary judgment in favor of appellees. 296 F.Supp. 214 (N.D.Cal. 1969). The American Civil Liberties Union of Northern California, as amicus curiae, appears in support of appellant.

The appeal presents a question as to the scope of judicial review. Section 552(a)(3) provides that "the court shall determine the matter de novo and the burden is on the agency to sustain its action."

Appellees insist, however, that this subsection does not apply here. They point to § 552(b) which states that "[t]his section does not apply to matters" in nine enumerated categories.[2] Appellees contend that agency determination

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[2]"(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(Continued on following page)

that the material sought falls within one of the nine exempted categories takes the case out of subsection (a)(3) and precludes the broad judicial review provided by that subsection. They assert that we are here faced with an agency determination that the (b)(1) exemption applies.

Unquestionably the Act is awkwardly drawn. However, in view of the legislative purpose to make it easier for private citizens to secure Government information, it seems most unlikely that it was intended to foreclose an (a)(3) judicial review of the circumstances of exemption. Rather it would seem that (b) was intended to specify the bases for withholding under (a)(3) and that judicial review de novo with the burden of proof on the agency should be had as to whether the conditions of exemption in truth exist. *See American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 702 (D.C.Cir. 1969). The District Court was, then, in error in holding to the contrary, 296 F.Supp. at 217.

This being so, appellant argues, the District Court should have taken the file for a determination *in camera* as to whether, under (b)(1) and the applicable executive standards, this file should, after twenty-four years, still be classified as "top secret" in the interests of the national defense or foreign policy.

(Note 2 continued)

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells."

Here we part company with appellant.

Section (b)(1) is couched in terms significantly different from the other exemptions. Under the others (with the exception of the third) the very basis for the agency determination—the underlying factual contention—is open to judicial review. *See General Services Administration v. Benson*, 415 F.2d 878 (9th Cir. 1969); *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 702 (D.C.Cir. 1969). Under (b)(1) this is not so. The function of determining whether secrecy is required in the national interest is expressly assigned to the executive. The judicial inquiry is limited to the question whether an appropriate executive order has been made as to the material in question.

This is not inconsistent with the legislative purpose. It simply recognizes the proposition that the question of what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with. As has been stated, the judiciary has neither the "aptitude, facilities, nor responsibility" to review these essentially political decisions. *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320-22 (1936).

Upon the narrow question remaining for judicial review, we note that the executive determination of top secret classification does not rest on an ancient order unrelated to the conditions of today. The classification has been updated and the process of current review is continuing. Nor is the agency hiding material under a filing system that gives top-secret classification to material simply because it relates, for filing purposes, to other material that is truly top secret. A paper-by-paper review was in operation in May, 1968. Nor do we find a foot-dragging passing of responsibility for ordering declassification to other departments or

nations. The Army has reached a decision and is seeking verification by the Joint Chiefs of Staff and the Department of State. Intercession with the British Government would, we are assured, follow a favorable decision by the agencies of the United States.

The District Court ruled that under (b)(1) it had authority to determine whether classification was arbitrary or capricious. It held that upon appellees' showing, classification could not be so characterized. In both respects we agree with the court's rulings. Further we agree that judicial inquiry into this narrow area does not, at least in this case, warrant *in camera* examination of the file.

The origin of the file's contents itself is sufficient to dispel any suggestion that the original classification was arbitrary or capricious. While the passage of time may cast doubt on the continuing need for secrecy, appellees have made more than a sufficient showing that questions bearing on that need persist and require resolution by the executive.

We conclude that subsection (b)(1) has been shown by the Army to apply and to justify withholding the material in question.

Judgment affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JULIUS EPSTEIN,
Plaintiff,

v.

STANLEY RESOR, Secretary of the Army, DEPARTMENT OF THE ARMY, DEPARTMENT OF DEFENSE.
Defendants.

No. 48962

MEMORANDUM AND ORDER

Plaintiff, an historian who is now a research associate at Stanford University's Hoover Institution on War, Revolution and Peace, brings this action pursuant to Section 3 of the Administrative Procedure Act, 5 U.S.C. §552, to enjoin the Secretary of the Army from withholding a file described as "Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul." The file was generated by the Allied Force Headquarters of World War II and has been classified Top Secret since 1948. The classification was made pursuant to the provisions of Executive Order 10501, 3 C.F.R. 484, (Supp. 1968).

Subsection (a) of Section 3 of the Administrative Procedure Act provides in part:

> "[E]ach agency, on request for identifiable records... shall make the records promptly available to any person. On complaint, the District Court of the United States . . . has jurisdiction to enjoin the agency from withholding any records and to order the production of any agency records improperly held . . . In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action . . ."

Subsection (b) of Section 3 provides:

> "This section does not apply to matters that are—
> "(1) specifically required by Executive Order to be

> kept secret in the interest of the national defense or foreign policy; . . ."

The defendants have moved to dismiss the action for lack of jurisdiction of the subject matter, or, in the alternative, for summary judgment. Plaintiff contends that the Top Secret classification on the file he seeks, is unwarranted and that this Court has the power to hold a trial de novo on the merits of this classification. He contends that such power is based on Section 3 of the Administrative Procedure Act. The Court is of the opinion that Congress did not intend to subject such classifications to judicial scrutiny to that extent.

Before discussing the purpose and effect of Section 3 of the Act, the Court directs its attention to the affidavit of Congressman John E. Moss, which plaintiff filed in support of his contentions. The affidavit has been introduced to give aid to the Court in interpreting the provisions of Section 3 of the Act. Congressman Moss' affidavit states:

> "[S]pecifically, it was my intent as the principal co-author of the legislation to grant to the appropriate District Court the broadest latitude to review all agency acts in this regard, including the correctness of a designation by an agency bringing documents within an exemption found in Section '(e)' of the Act; and that the powers granted to the Court and the burdens placed upon the Government in Section '(c)' were meant to include rather than exclude the exemption."

Statements made by legislators in debate can be a part of the legislative history which guides courts in statutory construction. See *Bindczyck v. Finucane,* 342 U.S. 76 (1951). On the other hand, statements made by a legislator after enactment of a statute and not a part of the records of the legislative body are entitled to little or no weight at all. *National School of Aeronautics v. U.S.,* 142 F. Supp. 933 (Ct. Cl. 1956). See also, *United States v. United Mine Work-*

ers of America, 330 U. S. 258 (1947). Such statements are not offered by way of committee report and are not offered for response by other members of the law-making body. The intent which is helpful in interpreting a statute, is the intent of the legislature and not of one of its members. For purposes of statutory construction, a legislative body can only speak through a statute, with the words that are used in light of the circumstances surrounding its enactment. For this reason, the Court has not considered the affidavit prepared and submitted by the Honorable John E. Moss solely for purposes of this lawsuit after the legislation in question was enacted.

Prior to amendment of Section 3 of the Act in 1966, this Section was described by Senator Long as:

> ". . . full of loopholes which allow agencies to deny legitimate information to the public. Enumerable times it appears that information is withheld only to cover embarrassing mistakes or irregularities. . . ." Senate Rep. No. 813, 89th Cong. 1st Sess., 111 Cong. Rec. 26821 (1965).

Senator Long went on to say in support of the amendment:

> "It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. . . ." *Id.* at 26821.

This purpose of full disclosure was accomplished by giving the United States District Courts jurisdiction to determine de novo whether information was being properly withheld with the burden of the withholding agency to sustain its action. 5 U.S.C. § 552(a)(3). This jurisdiction does not apply to information that falls within the exemptions set forth in subsection (b) of Section 3. To hold that the agencies have the burden of proving their action proper

even in areas covered by the exemptions, would render the exemption provision meaningless. If a determination de novo is made by this Court on whether the Top Secret classification by the Department of Army is proper, with the burden on the Secretary to sustain its action, the Court would be giving identical treatment to information withheld by an agency whether it fell within the exemption or not. Apparently, Congress did not intend such a result.

It may be argued that the exceptions enumerated in Section 3 are set forth merely to designate the various grounds on which information may be withheld and that the burden is on the agency to show that the information properly falls within the exception, with the district court having jurisdiction to make the determination de novo. That this position is unwarranted is shown by the clear expression of Congress in Subsection (b) of Section 3, "This section *does not apply* to matters that are [listed below.]" It is further shown by the statements of Congressman Gallagher on the floor of the House:

> "There has been some speculation that in strengthening the right of access to Government information, the bill, as drafted, may inadvertently permit the disclosure of certain types of information now kept secret by Executive order in the interest of national security.
>
> "Such speculation is without foundation. The committee, throughout its extensive hearings on the legislation and in its subsequent report, has made it crystal clear that the bill in no way affects categories of information which the President—as stated in the committee report—has determined must be classified to protect the national defense or to advance foreign policy. These areas of information most generally are classified under Executive Order No. 10501." 112 Cong. Rec. 13659 (June 20, 1966).

On the other hand, it is equally without merit to say that Congress intended absolutely no effect by the Act on infor-

mation that falls within the areas covered by the exemptions. The district courts at least have jurisdiction to determine whether the exemption applies in a given situation. In furtherance of this jurisdiction, it is reasonable to say that Congress intended the courts to determine whether classifications within the first exemption is clearly arbitrary and unsupportable. Otherwise, the agencies could easily frustrate the purpose of full disclosure intended by Congress merely by labeling the information to fall within the exemption.

In determining when information need not be disclosed if *classified* "top secret in the interest of national defense or foreign policy," guidance is set forth in the Act itself. Section 3 provides that the section does not apply to matters that are *"specifically required* by Executive order to be kept secret in the interest of the national defense or foreign policy." The Secretary of the Army has asserted the privilege of nondisclosure pursuant to Executive Order No. 10501 which reads in part:

> "Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret Classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense." Exec. Order 10501, §1(a).

Section 2 of the Executive Order further provides:

> "In the [Department of the Army] the authority for original classification of information or material under

this order may be exercised by the head of the department, agency, or governmental unit concerned or by such responsible officers or employees as he, or his representative may designate for that purpose."

By this Executive Order, the President has delegated authority to the Department of Army to classify matters Top Secret. The exercise of this authority is, as it must be, discretionary in nature. Judgment in this area is best rendered by those best equipped with the necessary facilities to do so. The function of this Court is similar to that described in *United States v. Reynolds,* 345 U.S. 1 (1953), by Mr. Chief Justice Vinson:

"The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect . . . . Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id.* at p. 8-10.

The *Reynolds* case was decided before the amendment to Section 3 of the Administrative Procedure Act was adopted and dealt with information being sought by discovery procedures. There is no reason for denying application of the principles announced in *Reynolds* to this case. Pro-

fessor Davis seems to accept this viewpoint in his discussion of the first exemption in Section 3 of the Act:

> "The Department of Justice as recently as 1965 took an official position that in withholding information 'the Executive is accountable only to the electorate. Under the separation of powers concept, Congress cannot transfer responsibility for Executive records to the courts.' That position seems to me extreme, just as is the opposite position that the courts may take the whole power away from the executive would be extreme; the long-term constitutional solution is likely to follow the middle position of the *Reynolds* case that the executive determines the scope of the privilege, subject to a judicial check whenever a court has jurisdiction." Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 764-5 (1967).

It is the opinion of this Court that Congress has granted it jurisdiction to determine whether the first exemption of Section 3 applies in this case. Plaintiff admits that the information he seeks has been *classified* Top Secret by the Department of the Army. The question remaining is whether or not this information is "required by Executive order to be kept secret in the interest of the national defense or foreign policy." In answering this question, the Court is limited to determining whether the Secretary of the Army has acted capriciously in exercising the authority granted to him by Executive Order 10501.

Although the information before the Court is not extensive, it is sufficient for rendering a decision on the issue of summary judgment. The ultimate facts are practically uncontested. The affidavit produced by Major General K. Wickham states that the documents in question are photographic reproductions made from microfilm copies of records generated by the Allied Force Headquarters which directed the allied military operations in the Mediterranean Theater of Operations. It further states that by

direction of the Combined Chiefs of Staff, the original records were released to the United States Government. Top secret classification "was required because the files contained many individual top secret documents of combined or British origin." Plaintiff, in his brief, states that the file is believed to contain information dealing with about 900,000 anti-Communist Russians who were forcibly repatriated from Germany to the Soviet Union at the end of the Second World War, and were either executed or died in slave camps after their repatriation.

The general subject matter of the file in question is described in the preamble to House Resolution 24, 86th Congress, 1st Sess. (1959). Plaintiff has appended to his brief a daily copy of the Congressional Record which describes Congressman Bosch's presentation of the remarks prepared by plaintiff in support of H. R. 24. In these remarks, the plaintiff himself had quoted and used the preamble to H. R. 24 which reads:

> "Whereas this forced repatriation of prisoners of war and civilians cannot be justified by the agreement on prisoners of war, made public by the Department of State on March 8, 1946; and
>
> "Whereas the forced repatriation of prisoners of war who had enlisted in the enemy's army was in contradiction to the opinion of the Judge Advocate General of the Army, as expressed during the last 40 years; and
>
> "Whereas the forced repatriation of millions of anti-Communist prisoners of war and civilians represent an indelible blot on the American tradition of ready asylum for political exiles; and
>
> "Whereas the forced repatriation and annihilation of millions of anti-Communist prisoners of war and civilians of Russian, Ukrainian, Polish, Hungarian, Baltic, and other origin is still poisoning our spiritual relations with the vigorously anti-Communist peoples be-

hind the Iron Curtain, and is therefore impeding our foreign policy . . ." 105 Cong. Rec. A3226 (1959).

The Court concludes that the information above speaks for itself and thus finds that the circumstances are appropriate for the classification made by the Department of the Army in the interest of "the national defense or foreign policy."

Accordingly, the motion to dismiss the complaint is denied, and the motion for summary judgment is granted in favor of the defendants.

Dated: February 19, 1969.

OLIVER J. CARTER
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JULIUS EPSTEIN, *Plaintiff,* v. STANLEY RESOR, etc., *Defendant.*	CIVIL No. 48962 FINDINGS, CONCLUSIONS AND JUDGMENT

This action having come regularly before the Court on the alternative motions of the defendant for dismissal for lack of jurisdiction or summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure; and

The motions having been made and argued by the attorneys for the respective parties, and supplemental memoranda and affidavits thereafter presented and the motions duly submitted; and

The Court being fully advised in the premises, entered its Memorandum and Order on February 19, 1969 which is hereby incorporated as though fully set forth herein, and pursuant to which the Court hereby *finds* and *concludes* that:

1. The Court has jurisdiction of the action under Title 5, United States Code, Section 552(a)(3); and
2. There is no genuine issue as to any material fact and the defendant is entitled to a judgment as a matter of law.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The motion of the defendant to dismiss the action for lack of jurisdiction is denied; and
2. The alternative motion of the defendant for summary judgment in his favor and against the plaintiff is

granted, and this judgment shall be entered accordingly with costs and disbursement to be taxed by the Clerk in favor of the defendant.

Dated: April 14, 1969

OLIVER J. CARTER
United States District Judge